No. 86-1432

# In the Supreme Court of the United States

October Term, 1986

ELIZABETH A. GOBLA,
*Petitioner*

vs.

CRESTWOOD SCHOOL DISTRICT, WILLIAM SMODIC and THEODORE J. GEFFERT,
*Respondents*

## RESPONDENT'S BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions noted by Petitioner, the Respondents reference the *Pennsylvania Public School Code of 1949 as amended, 24 P.S. §11-1127*. The foregoing statute is reproduced as APPENDIX A.

## COUNTERSTATEMENT OF THE CASE

Mindful of the mandate to be as brief as possible, Respondents nevertheless are constrained to restate the case to correct regrettable inaccuracies and omissions in the rendition related in the Petitioner's Brief.

The Petitioner, Elizabeth Gobla, became a tenured teacher in the Crestwood School District in May, 1973, and she was afforded all the rights and privileges provided in the Pennsylvania Public School Code of 1949 as amended, including discipline procedures as set forth in 24 P.S. §11-1127.

In February, 1978, the Petitioner was notified by the School District that a hearing was being scheduled to consider charges of insubordination against her due to her failure to follow the sign-in procedure for four consecutive days. The Petitioner responded to this notice by affixing her signature to the sign-in sheet in an Oriental language on the day of the hearing and she also circulated a mimeographed flyer bearing the words "WHAT, ME WORRY?" together with a cartoon character from *Mad* Magazine named Alfred E. Newman. The flyer ridiculed the upcoming disciplinary hearing and called for a gathering of her sympathizers at a local bar after that hearing. As a result of the March 1978 disciplinary hearing, the Petitioner was suspended without pay for twenty (20) days, commencing March 13, 1978. However, on March 10, 1978, she sustained a work-related injury and collected Workmen's Compensation for the rest of that school year.

See *Gobla v. Crestwood School District*, 51 Pa. Commonwealth Ct. 539, 414 A.2d 772, 773 (1980).

In the course of her medical absence, she ignored requests to return her lesson plan book, grade book, and school keys. She also failed to respond to requests for information concerning her availability for work in the upcoming 1978-1979 school year and she ignored requests for medical information to substantiate the basis for her Workmen's Compensation claim.

As a result of her defiant conduct during the balance of the school term from which she was absent, she was notified on September 5, 1978, that a hearing was being scheduled to consider thirty-five (35) specific charges of insubordination and violations of school laws. Two hearings were held at which the Petitioner was represented by Counsel and at the conclusion of the hearings, the Petitioner was notified that she was dismissed from her employment as teacher on November 1, 1978. The Petitioner exercised her rights of appeal to the Secretary of Education who upheld the decision of the School Board and she subsequently appealed to the Commonwealth Court of Pennsylvania which also upheld her dismissal. The Commonwealth Court, in the case of *Gobla v. Crestwood School District*, 51 Pa. Commonwealth Ct. 539, 544, 414 A.2d 772 (1980) stated on page 774:

> "This Court must affirm the order of the Secretary unless there was a violation of constitutional rights, an abuse of discretion, an error of law, or if a necessary finding of fact is unsupported by substantial evidence. (Citations omitted.) We find no infirmity which warrants our disturbing the order of the Secretary of Education in this case, and we affirm."

*Counterstatement of the Case*

The Petitioner did not exercise her right of appeal to the Pennsylvania Supreme Court and, therefore, the decision of the Commonwealth Court became final.[1]

On September 5, 1978, the day on which Petitioner was notified that she was being suspended pending a termination hearing, an attorney sent a letter on her behalf to the School District stating, in part, "Please consider this letter notice to the School District for the institution of a lawsuit for the damages pursuant to section 1983 of the Federal Civil Rights Act." Petitioner did not institute her claim for damages under section 1983 until June 4, 1982.

The Petitioner filed her Complaint against the Crestwood School District, William Smodic, Theodore J. Geffert, and the nine School Board members alleging, inter alia, that the Defendants had filed false charges, se-

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[1] In a Motion to Dismiss, the Defendants urged the District Court to invoke the Doctrine of Collateral Estoppel or Res Judicata since the Claimant had already litigated her constitutional rights through the Pennsylvania Court System. "The fundamental rule is that a prior judgment on the merits is conclusive not only as to those issues actually raised but as to those also which might have been raised but were omitted." *Husted v. Canton Area School District et al.*, 73 Pa. Commonwealth Ct. 380, 458 A.2d 1037, 1039 (1983). The Plaintiff escaped the invocation of this Fundamental Rule at that early stage of the instant litigation based on her claim that she did not know of the alleged constitutional violations until Mary Redgate disclosed them to her in 1981. The Defendants reasserted the Doctrine of Collateral Estoppel in their Motion for Directed Verdict and Motion N.O.V. insofar as a thorough review of Mary Redgate's testimony at trial reveals that she did not, in fact, offer anything relating to any alleged First Amendment Offenses. The Trial Court also recognized this failing and instructed the jury during the trial that Mary Redgate did not, in fact, offer any testimony substantiating the plaintiff's First Amendment argument. The Respondents assert that *Migra v. Warren City School District*, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed. 2d 56 (1984) should have been applied.

cured false statements from alleged witnesses, and denied the Plaintiff's Due Process Rights. These allegations were made in spite of the fact that Petitioner had three (3) previous hearings and the Commonwealth Court held that the evidence submitted by the School administrators was sufficient to sustain the charges against the Petitioner and the Commonwealth Court also commented that the Petitioner did not contest the sufficiency of the evidence. *Gobla v. Crestwood School District*, 51 Pa. Commonwealth Ct. 539, 414 A.2d 772, 773 (1980). It should be noted that the Petitioner voluntarily dismissed the nine (9) School Board members as Defendants in this case on May 4, 1984 even though the legal authority to dismiss a professional employee from employment with the School District is lodged in the Board of Directors of the School District 24 P.S. §11-1127. (See Appendix A, p. 1a.)

The Defendants responded to Plaintiff's complaint by presenting a Motion to Dismiss because the Complaint was not timely filed. At the time the Defendants asserted the defense of the Statute of Limitations, there were several decisions by District Courts indicating that a six (6) months' residuary limit established by 42 Pa. C.S.A. 5522(b)(1) was the applicable Statute of Limitations for Claims Against Public Officials. *Clyde v. Thornburg*, 533 F. Supp. 279 (EDPA 1982); *Kelly v. City of Philadelphia*, 552 F. Supp. 574, 577 (EDPA 1982). It was not until January 27, 1983 that the Third Circuit Court of Appeals in the case of *Knoll v. Springfield Twp. School District*, 699 F.2d 137 held that the appropriate Statute of Limitations was a residual statute of six (6) years. The decision in that case was rendered more than six (6) months subsequent to the time that the Petitioner filed her Suit in June of 1982. She could not have relied on that holding in ascertaining the

correct Statute of Limitations to apply to her proposed action.

The District Court in this case correctly concluded that since the Defendants raised the Statute of Limitations as the defense immediately, they are free to reassert that defense in light of the fact the precedent the District Court relied upon has been vacated. *Gobla v. Crestwood School District et al.*, 628 F. Supp. 43 (M.D. PA 1985).

This case presents neither a factual nor a legal basis sufficient to merit a granting of a Writ of Certiorari to the Third Circuit Court of Appeals.

## REASONS FOR REFUSING TO GRANT THE WRIT OF CERTIORARI

### I.

### This Court Has Determined the Scope of the Retroactive Application of *Wilson v. Garcia,* 105 S.Ct. 1938 (1985)

In the case of *Wilson v. Garcia,* supra, this Court held that the New Mexico statute which provided a three-year limitations period for personal injury actions applied to a claim filed under 42 U.S.C. Section 1983 and in so holding, this Court effectively overruled the New Mexico Supreme Court's consistent application of a two-year Statute of Limitations. In *DelCostello v. Teamsters,* 462 U.S. 151 (1983), this Court declined to apply a state Statute of Limitations when the Court was convinced that a Federal Statute of Limitations for another cause of action better reflected the balance that Congress would have preferred between the substantive policies underlying the Federal claim and the policies of repose. In effect, this Court was retroactively applying a Statute of Limitations because it believed that the Federal statute better served the purposes underlying the Federal claim.

The Petitioner has stated at Page 10 of her Petition "the fact is that Mrs. Gobla would be returned to her tenured faculty position in the Crestwood School District if she resided within the United States Court of Appeals for the Sixth Circuit, the Seventh Circuit, the Ninth Circuit

or the Tenth Circuit." The Petitioner has cited in the footnotes the cases of *Carroll v. Wilkerson*, 782 F.2d 44 (6th Cir. 1986), *Anton v. Lehpamer*, 787 F.2d 1141 (7th Cir. 1986), *Gibson v. United States*, 781 F.2d 1334 (9th Cir. 1986), and *Jackson v. City of Bloomfield*, 731 F.2d 652 (10th Cir. 1984) in support of this statement. A reading of these cases clearly shows that the cases do not stand for the proposition asserted by the Petitioner. In the case of *Carroll v. Wilkerson*, supra, the U. S. Court of Appeals, 6th Circuit, applied this Court's holding in *Wilson v. Garcia* retroactively and the Court in that case noted that it was following its holding in *Mulligan v. Hazard*, 777 F.2d 340 (1986) petition for rehearing denied August 19, 1986. U.S. , 92 L.Ed. 2d 767, 107 S.Ct. 12. In *Anton v. Lehpamer*, supra, the Court of Appeals for the 7th Circuit did not apply *Wilson v. Garcia*, supra, retroactively for the stated reason that at the time the plaintiff filed his Suit, the Federal Courts in Illinois applied a five-year statute in all Section 1983 actions.

In the case of *Gibson v. United States*, supra, the 9th Circuit Court of Appeals did not apply *Wilson v. Garcia* retroactively and gave the following reasons for its holding: "Before *Wilson*, this Circuit had long held that the California three-year Statute of Limitations for actions "upon a liability created by statute", ... governed all Section 1983 claims brought in California." Supra, page 1339. It further stated "the final Chevron factor weighs dispositively against retroactive application, for it would yield ' "substantial inequitable results" to hold that the Respondent "slept on his rights" at a time when he could not have known the time limitation that the Law imposed upon him.' " Supra, page 1339.

In *Rivera v. Green,* 775 F.2d 1381 (9th Cir. 1985), the Court granted Wilson retroactive application when it had the effect of lengthening rather than abbreviating the limitation.

In *Jackson v. the City of Bloomfield,* supra, at page 655, the 10th Circuit did not apply *Wilson v. Garcia* retroactively stating:

> "At the time this Suit was filed, Hansbury v. The Regents of the University of California, 596 F.2d 944, was clear authority that the New Mexico four-year limitations period governed claims of unconstitutional employment discrimination under section 1983. Shah was also clear authority that the longer of the two arguably applicable limitations statutes would be applied. ... Plaintiffs justifiably relied on those cases in concluding that their suit was timely."

In the case at Bar, there was no clear authority upon which the Petitioner could have relied. *Fitzgerald v. Larson,* 769 F.2d 160, *Smith v. the City of Pittsburgh,* 764 F.2d 118 (3rd Circuit 1985), Cert. Denied (106 S.Ct. 349) 1985. In the case of *Fitzgerald v. Larson,* supra, at page 164, the 3rd Circuit Court of Appeals stated that:

> "We thus conclude, as we did in Smith v. City of Pittsburgh, that the law was not sufficiently clear to have made it reasonable for a plaintiff to have delayed filing suit for more than two years after May 1979 in the expectation that a six-year limitation period would apply to a claim of wrongful discharge in violation of the First Amendment. The Supreme Court's decision in Wilson v. Garcia did not have the effect, in this situation, of overruling 'clear past precedent on which

litigants *may have relied*.' Chevron, 404 U.S. at 106, 92 S.Ct. at 365 (emphasis added)."

In conclusion, Respondents contend that the instant case is not a proper case for granting a Writ of Certiorari.

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II.

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**This Case Does Not Present a Factual Vehicle To Determine the Application of State "Discovery Rules" to Actions Under Section 1983**

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Plaintiff clearly did not file her action within two years of her dismissal and therefore she now urges upon this Court, as she did upon the lower Courts, that a conspiracy existed to keep certain information from her. She asserts that the Pennsylvania "Discovery Rule" should be applied to the facts of this case. She claimed that she did not discover that she was fired for outspokenness and in retaliation for her exercise of First Amendment rights until February 13, 1981, when she maintains it was disclosed to her by Mary Redgate upon the occasion of Mary Redgate's dismissal from the Crestwood School District for immorality.

The facts do not support her contention.

As it was noted by the District Court,

"A careful review of Redgate's trial testimony, however, reveals that Redgate offered no support to plaintiff's theory that she was fired for exercising her right to free speech, *viz.* speaking out on kick-backs

> of school rings or writing to the newspaper criticizing the School Board. Rather, Redgate's testimony did not even address these issues and was directed principally to her part in collecting harmful data on plaintiff's teaching activities which ultimately were utilized by the School Board to support plaintiff's discharge." (*Gobla v. Crestwood School District et al.*, 628 F. Supp. 43, 47, (M.D. Pa. 1985))

The testimony of Mary Redgate disclosed that she had performed a classroom observation of Mrs. Gobla and that, following that observation and after her critique, Mrs. Gobla became abusive toward her. This incident, which Redgate testified occurred in December of 1977, was reported to Theodore Geffert and William Smodic and, according to her testimony, Dr. Smodic directed her at that time to observe the Plaintiff and document incidents of insubordination. Redgate did not, in fact, tie the directive to document incidents of insubordination to anything but the abusive conduct of the Plaintiff, Elizabeth Gobla, directed toward Mrs. Redgate (N.T. pages 215-218).

The fact that Mrs. Redgate did not offer anything having to do with the Plaintiff's First Amendment allegations was recognized and commented upon by Judge Nealon at Volume II, page 253 of the Transcript.

Even though Plaintiff's contention finds no basis in the facts and testimony was so minimal that the Court did not even submit the issue to the jury, Petitioner persists in relating this imagined favorable testimony as if it had indeed occurred. Plaintiff did not object at trial to the Court's not submitting the issue of conspiracy to the jury and is there-

fore precluded from asserting that the conspiracy claim is still viable. Fed. R.Civ.P. 49(a).[1]

Not only did Plaintiff's claim of conspiracy disappear at trial, but the Plaintiff's contention that she was unaware of any constitutional violation until 1981 was also refuted.

In further support of the inexcusable nature of the delay by the Plaintiff, reference is made to a letter from Elizabeth Gobla's counsel, John P. Moses, to Joseph B. Farrell, Solicitor for the Crestwood School District, dated September 5, 1978, placing the District on notice of the Plaintiff's intention to file a lawsuit for money damages pursuant to section 1983 of the Federal Civil Rights Act.[2] It is readily apparent that the Plaintiff intended to file a Civil Rights action as long ago as the date when she received the specification of charges by the School Board against her. Inexplicably, she refrained from filing her suit until June 4, 1982.

Plaintiff has cited a number of cases in her Brief on the application of the "Discovery Rule" which are not analogous to the instant case at all. One case, *Lewey, Appellant v. Fricke Coke Co.*, 166 Pa. 536, 31 Atlantic 261 (1895) refers to a situation wherein the defendant mined coal on property owned by the plaintiff by means of an underground approach which was not visible to the plaintiff. The other cases relate to medical problems arising from creeping asbestosis and other similar medical difficulties. They

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[1] Since the Plaintiff did not request the issue of conspiracy or discovery be submitted to the jury, the Court is thereupon empowered to make its own findings on these issues. Having considered all of the evidence, Judge Nealon has found that there was insufficient evidence to support the allegation of conspiracy. Furthermore, he has found that Mary Redgate did not disclose any evidence upon which the Plaintiff can assert her discovery claim.

[2] This letter is reproduced at Third Circuit JA. 543(a).

are inapplicable to the case at bar. Since Mary Redgate revealed nothing in her testimony having any nexus to the alleged First Amendment violations, nothing was "discovered" from her and the Discovery Rule should not be applied.

This case simply does not contain facts upon which to consider the question urged by the Petitioner.

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III.

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**This Court Need Not Determine Whether or Not Civil Rights Defendants and Trial Courts Can Assert Affirmative Defenses Post-Verdict Which Were Neither Pleaded Nor Raised Prior to Verdict Since the Facts Do Not Support This Consideration**

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The Petitioner has sought to fashion an issue of general importance from an alleged pleading deficiency which is patently illusory. The Defendants did plead the Statute of Limitations and did so immediately in the form of a Motion to Dismiss which was converted to a Motion for Summary Judgment by the Court. At the time that the Defendants asserted the defense of the Statute of Limitations, there were several decisions by United States District Courts in Pennsylvania indicating that a six-month limit established by 42 Pa. C.S.A. Section 5522(b)(1) was an applicable Statute of Limitations for claims against public officials. *Clyde v. Thornburg*, 533 F. Supp. 279 (EDPA 1982); *Kelly v. City of Philadelphia*, 552 F. Supp. 574 (EDPA 1982). It was not until January 27, 1983 that the Third Circuit Court of Appeals in the case of *Knoll v.*

*Springfield Twp. School District*, 699 F.2d 137, held that the appropriate Statute of Limitations was a residual statute of six years, and this decision formed the basis of the District Court's denial of the Defendant's Motion to Dismiss.

The Defendants raised the Statute of Limitations defense on three separate occasions. It had been raised in Defendants' Motion to Dismiss filed July 6, 1982, at a pre-trial conference with Judge Nealon and opposing counsel on February 28, 1985 prior to trial and in the context of Motion and Affidavit filed with the Court by Joseph B. Farrell on March 4, 1985. Through the efforts of defense counsel, the progress of the *Knoll v. Springfield Twp.* case had been monitored, and opposing counsel and the Court had been apprised of the argument date before the Supreme Court and discussion was had with the Court and counsel as to the effect this Honorable Court's determination could have on the case at bar. Nevertheless, the District Court proceeded to trial with this case notwithstanding the pendency of this important issue.

The Honorable William J. Nealon, Chief Judge of the Middle District of Pennsylvania, who authored the decision applying *Wilson v. Garcia* and *Knoll v. Springfield* to the case at bar had the benefit of knowing firsthand through his participation in the pre-trial conferences how strenuously the Defendants had pressed the Statute of Limitations issue. It is submitted that fair and just result was reached by Judge Nealon when it was determined that the case which had been tried and submitted to the jury (with the Plaintiff well aware that this Honorable Court's imminent decision in *Wilson v. Garcia* and *Knoll v. Springfield Twp.* could drastically affect the outcome) was,

indeed, a stale case and one which should have been dismissed by application of the applicable Statute of Limitations.[3]

The Plaintiff criticizes the lower Court for selecting the appropriate Statute of Limitations once that bar has been pleaded and characterizes this selection as "absurd." It should be noted that this Honorable Court did precisely this same thing in both *Wilson v. Garcia* and *Knoll v. Springfield Twp.* in determining *and applying* the appropriate limitation. The Petitioner plainly attempts to mislead this Court with the faulty impression that the Statute of Limitations defense was not timely pled or not pled until after the jury verdict. The District Court disposed of this argument stating:

> "The cases Plaintiff cites in support are inapposite in that those cases involved a situation in which the Defendant failed to plead the affirmative defense at all or failed to raise the defense until just before or during trial. See, e.g., Peterson v. Airline Pilots Assoc. Internat., 759 F.2d 1161 (4th Cir. 1985); Trio Process Corp. v. L. Goldstein's Sons, Inc., 461 F.2d 66 (3rd Cir. 1972); Evans v. Syracuse City School District, 704 F.2d 44 (2d Cir. 1984)."

As Judge Nealon stated further:

> "This Court does not interpret the analysis as restricting the Court to choose only the limitations period advanced by the parties. Rather, once the

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[3] The primary consideration underlying Statutes of Limitations is to expedite litigation and to preclude long delays which would be prejudicial to the person against whom the action is brought. *Insurance Company of North America v. Carnahan*, 446 Pa. 48, 284 A.2d 728 (1971); *Philadelphia, Appellant v. Litvin*, 211 Pa. Superior Ct. 204, 235 A.2d 157 (1967).

> issue of the Statute of Limitations period has been raised, the *Court* makes the determination of the appropriate limitations period. ... Thus, the Court is not bound to choose only the particular limitations period advanced by the parties. Rather, the *Court* chooses the applicable period after appropriate analysis, once the issue has been raised. Because defendants raised the Statute of Limitations as a defense immediately, they are free to re-assert that defense in light of the fact that the precedent this Court relied upon has been vacated. See Knoll, supra."[4]

This case simply does not contain facts upon which to consider the questions urged by the Petitioner.

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[4] At footnote 19 of Petitioner's Brief, the Petitioner misrepresents that Springfield Twp. School District in the *Knoll* case, supra, asserted a two-year statute of limitations. The facts indicate that a six-month statute was pled as the lawsuit was filed on April 21, 1981 upon action of the Board of School Directors in July of 1979. Nevertheless, upon remand, although only a six-month statute was pled, the Court, after considering all the circumstances, applied a two-year statute and held the action timely. *Knoll v. Springfield Twp. School District*, 763 F.2d 584 (Third Circuit Court of Appeals 1985).

## CONCLUSION

The respondents respectfully request that the petitioner's request for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit be denied. The case at bar does not present a factual vehicle to substantiate the issues urged by the petitioner. Furthermore, the Honorable William J. Nealon properly applied the law based on the facts before him which decision was properly upheld by the United States Court of Appeals for the Third Circuit. Respondents respectfully request that petitioner's request be denied.

Respectfully submitted,
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*Appendix A*

# APPENDIX A

## §11-1127. PROCEDURE ON DISMISSALS; CHARGES; NOTICE; HEARING

Before any professional employe having attained a status of permanent tenure is dismissed by the board of school directors, such board of school directors shall furnish such professional employe with a detailed written statement of the charges upon which his or her proposed dismissal is based and shall conduct a hearing. A written notice signed by the president and attested by the secretary of the board of school directors shall be forwarded by registered mail to the professional employee setting forth the time and place when and where such professional employe will be given an opportunity to be heard either in person or by counsel, or both, before the board of school directors and setting forth a detailed statement of the charges. Such hearing shall not be sooner than ten (10) days nor later than fifteen (15) days after such written notice. At such hearing all testimony offered, including that of complainants and their witnesses, as well as that of the accused professional employe and his or her witnesses, shall be recorded by a competent disinterested public stenographer whose services shall be furnished by the school district at its expense. Any such hearing may be postponed, continued or adjourned. 1949, March 10, P.L. 30, art. XI, §1127.